No. 13675

IN THE

United States Court of Appeals

For the Ninth Circuit

EDWARD B. CALDERON,
Appellant,
v.
UNITED STATES OF AMERICA,
Appellee.

On Appeal from the United States District Court for the District of Arizona

PETITION OF THE UNITED STATES FOR REHEARING

H. BRIAN HOLLAND,
Assistant Attorney General.

ELLIS N. SLACK,

FRED G. FOLSOM,
Special Assistants to the Attorney General.

JACK D. H. HAYS,
United States Attorney.

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PETITION OF THE UNITED STATES FOR REHEARING

Counsel for the United States of America, believing the opinion entered by this Court in the above-entitled cause, under date of October 9, 1953, to be erroneous, respectfully requests that a rehearing be granted by this Court and that the opinion of October 9, 1953, be withdrawn and the judgment of the District Court be affirmed for the following reasons*:

1. The question presented by this appeal is whether corroboration of a defendant's admissions as to cash

* An extension of the time for filing this petition was granted to December 9, 1953.

on hand is essential to a *prima facie* case of wilful attempted income tax evasion based upon the net worth method of establishing additional net income. The prosecution relied (for proof of the omission of income and understatement of tax) on evidence of annual increases in the appellant's net worth plus yearly nondeductible expenditures in excess of reported net income. The annual beginning and ending assets and liabilities were stipulated with the exception of the items of bank balances and cash on hand at the end of the year 1945. The year end bank balances were shown by bank records and are not questioned in this appeal. Cash on hand, i.e., undeposited currency, was established by the testimony of the Government's investigating agents that the appellant had orally admitted to having about $500 currency on December 31, 1945. (R. 58-59.) Appellant had also signed as correct a net worth statement prepared by the agents embodying this $500 cash-on-hand asset. (R. 123.) This Court's opinion concludes that for lack of corroboration of this single admission the net worth proof was insufficient.

It is apparent from a consistent line of authorities in the Courts of Appeals that a net worth statement is sufficient to reflect unreported income if the assets and liabilities included, with the exception of cash on hand, are documented by competent evidence, and, if the starting item of cash on hand is established by the taxpayer's admission. In *Bryan* v. *United States,* 175 F. 2d 223, 227, the Court of Appeals for the Fifth Circuit clearly stated that the net worth proof would there have been sufficient had the cash-on-hand item been shown by the defendant's admission. If any argument be made that the Fifth Circuit statement in this regard was *obiter,* then we respectfully refer the Court to the case of *United States* v. *Pollock,* 202 F. 2d 281, 284, in the same Circuit, wherein the statements of the de-

fendant under oath during the investigation which were used at the trial to establish net worth at the beginning of the questioned period were specifically held to be sufficient. Again, in the Fourth Circuit in *Bell* v. *United States,* 185 F. 2d 302, certiorari denied, 340 U. S. 930, the precise point here raised by the appellant was disposed of as follows (pp. 307-309):

> The defendant makes the contentions that the evidence of net worth was inaccurate and lacking in probative force, and was therefore inadmissible, and that the prejudicial statements of the defendant should not have been taken into consideration because a conviction of crime cannot be sustained by extra judicial admissions alone without independent proof of the corpus delicti. It is said in the first place that the foundation statement at the beginning of the period on December 31, 1942 was inaccurate because it did not take into account currency in the hands of Bell and his wife at the end of 1942, * * *.
>
> An examination of the record indicates that the probative force of the evidence relating to the net worth of the taxpayer at the beginning of the period under examination is not undermined by these criticisms. The amount of currency undeposited and in the hands of the defendant and his wife on December 31, 1942 was small, according to Bell's statement, and could not be determined when the investigation started in 1946. * * *
>
> * * * * *
>
> The defendant, pointing out that the government's case against him consists of the net worth statements and his own admissions, contends that the case must fall on the ground that the net worth statements are insufficient in themselves to prove his guilt and that in the absence of proof of the corpus delicti, a conviction of crime may not be based solely on the confessions or admissions of the defendant. This argument assumes that the net

worth statements in themselves furnish no substantial evidence whatsoever of the corpus delicti in this case; but is not true, as we have seen. Moreover, the rule does not require that the corpus delicti be completely shown by evidence aliunde defendant's confessions, but admits the confessions where other substantial evidence of the crime is shown, and thereupon both the statements of the defendant and the independent evidence must be taken into consideration by the jury in determining whether guilt is proven beyond a reasonable doubt. In *Daeche* v. *U. S.,* 2 Cir., 250 F. 566, 571, cited with approval in *Warszower v. U. S.,* 312 U. S. 342, 345, 61 S. Ct. 603, 85 L. Ed. 876, it was said: "* * * The corroboration must touch the corpus delicti in the sense of the injury against whose occurrence the law is directed; in this case, an agreement to attack or set upon a vessel. Whether it must be enough to establish the fact independently and without the confession is not quite settled. Not only does this seem to have been supposed in some cases, but that the jury must be satisfied beyond a reasonable doubt of the corpus delicti without using the confessions, before they may consider the confessions at all. * * * But such is not the more general rule, which we are free to follow, and under which any corroborating circumstances will serve which in the judge's opinion go to fortify the truth of the confession. Independently they need not establish the truth of the corpus delicti at all, neither beyond a reasonable doubt nor by a preponderance of proof." See also, *Yost v. U. S.,* 4 Cir., 157 F. 2d 147, 150; *Forte v. U. S.,* 68 App. D. C. 111, 94 F. 2d 236.

To the same effect see *Brodella* v. *United States,* 184 F. 2d 823, 825 (C.A. 6th) and *United States v. Yeoman-Henderson, Inc.,* 193 F. 2nd 867 (C.A. 7th). Indeed this very Court in *Davena v. United States,* 198 F. 2d 230, 232, certiorari denied, 344 U. S. 878, has upheld a net worth statement which included an asset provable only by the defendant's signed net worth statement.

Two cases are cited as authority for this Court's reversal of appellant's conviction. The first, *Spriggs* v. *United States,* 198 F. 2d 782 (C.A. 9th), is clearly distinguishable; it was not a case resting on net worth proof and the admissions were all the Government's evidence not, as here, only a fragment. The *Spriggs* opinion shows that the defendant's conviction rested solely on testimony as to his statements establishing that excessive depreciation was claimed on his 1947 income tax return. There was not, as in the present case, complete net worth proof quite independent of any admissions save for those relating to the single item of cash on hand. The second case, *United States* v. *Chapman,* 168 F. 2d 997, 1001 (C.A. 7th), certiorari denied, 335 U. S. 835, does not conflict with the authorities we cite above. The admissions there held to be corroborated went to the entire statement of assets and liabilities shown the defendant by the investigating agents. To the extent that Chapman's admission denied the existence of any appreciable cash on hand, other than as shown on his business books, it was no more corroborated than appellant's admission in the present case. It is not believed that this Court could have reached the conclusion it did in the instant opinion had the uniform rule in other circuits or the precedents in this very Court been fully considered. The allegedly uncorroborated admissions as to the item of cash on hand, which the opinion of this Court seizes upon as the fraility in the Government's case, must almost of necessity be established in many instances by the admissions of the taxpayer. Every-day experience establishes that the amount of currency that any man may have on hand at any given time is very often a fact known only to himself. This Court's ruling would put an almost insuperable burden of proof on the Government by deny-

ing reliance on the exclusive source of accurate proof, i.e., the defendant's admissions.

2. A thorough examination of the record discloses that during two of the years when the defendant testified he had his greatest accumulation of cash the defendant further acknowledged, on cross-examination, that he correctly reported his net profit in 1945 as $2,336.20 (R. 184-185), and in 1944 as $4,162.50 (R. 186). If corroboration is needed for the taxpayer's admission as to nominal cash on hand at the beginning of 1946, the foregoing figures from the two immediately preceding years furnish some persuasive measure of corroboration and they moreover substantially undermine the defendant's testimony in chief that he had $16,000 or $17,000 accumulated during the war years at the beginning of 1946. (R. 164.) Cf. *United States* v. *Chapman, supra,* p. 1002, wherein the court found corroboration in the unsubstantiated nature of the defense testimony as to a vast cash accumulation at the starting point. And if, on the other hand, the appellant's testimony that he had as much as $17,000 in currency accumulated can be believed, it most assuredly constitutes a judicial admission and therefore would require no corroboration. The corrected net income for 1946 would then be reduced from $24,855.49 (R. 102) to $7,855.49 as against net income reported of $3,836.68. Contrary to this Court's statement, none of the figures for the three succeeding years would be affected. Therefore, considering all the evidence in the case in the light most favorable to the Government, there was substantial evidence, which this Court has wholly failed to consider, to support the verdict.

3. It is submitted that this Court was in error in holding that the defendant's statement to the agents that he had $500 cash on hand at the beginning of 1946 required

corroboration. That statement was not a confession. Nor was the statement an admission in the nature of a confession which would require corroboration. It did not, in and of itself, substantially show the *corpus delicti*. It was instead a declaration of an isolated fact and that fact coupled with other facts and circumstances made up the mosaic of circumstantial net worth evidence to establish understatement of net income and tax. *United States v. Yeoman-Henderson, Inc.,* 193 F. 2d 867, 869 (C.A. 7th). Cf. *Davena* v. *United States, supra,* and *Gendelman* v. *United States,* 191 F. 2d 933, 995 (C.A. 9th), wherein an uncorroborated admission of ownership of an entire business enterprise was held sufficient as to that income-producing business. This Court seems to have cited *Pon Wing Quong* v. *United States,* 111 F. 2d 751 (C.A. 9th); *Gulotta* v. *United States,* 113 F. 2d 683 (C.A. 8th); *Yost v. United States,* 157 F. 2d 147 (C.A. 4th), as holding to the contrary. The Government submits that they do not. The case of *Pon Wing Quong* involved a confession in the true sense of the word and concerned only the test of its admissibility in terms of whether or not it was voluntarily given. The *Gulotta* case raised the question of whether a confession was sufficiently corroborated by a separate and distinct admission which in and of itself established the *corpus delicti*. By the test laid down in *Warszower* v. *United States,* 312 U. S. 342, which specifically mentions thte *Gulotta* case, the latter would appear to have been wrongly decided. The *Yost* case again concerned only a true confession.

It is obvious that there is a distinction between (1) a confession which acknowledges guilt, (2) an admission which contains the necessary ingredients to establish guilt but falls short of acknowledging guilt, and (3) a declaration of fact by a party defendant which in itself does not establish the gist of the offense and

is in regard to an isolated circumstance. The courts have consistently permitted the use of the latter type of admissions without corroboration. See cases cited in Point 1, *supra,* and Wigmore on Evidence (3d ed.), Vol. III, Secs. 821(3) and Vol. VII, 2074.

Examination of the rule as to the nature of the corroboration necessary to sustain a case based primarily on a confession or an admission in the nature of a confession clearly demonstrates the correctness of the Government's position. Since the "corroboration must touch the *corpus delicti* in the sense of the injury against whose occurrence the law is directed * * *" (*Daeche* v. *United States,* 250 Fed. 566, 571 (C.A. 2d)), it is obvious that the thing to be corroborated must demonstrate the *corpus delicti.* By its terms then the rule would not apply to require corroboration of an admission of an isolated circumstance. Again, "in this Circuit [the Ninth Circuit] * * * it is established that the evidence corroborating a confession of the defendant need not independently prove the commission of the crime charged, neither beyond a reasonable doubt nor a preponderance of proof." *Davena* v. *United States,* 198 F. 2d 230, 231. That this elucidation by this Court of the requirement of corroboration is inapposite to an isolated fact admission, is so clear as to need no argument. It further illustrates the point that the admission or confession to be corroborated is one which independent of other evidence contains the elements of the offense. Contrarywise, corroborating proof of an isolated admitted fact (such as the value of an asset in a net worth statement) would of necessity constitute independent proof of that fact. No rule exists requiring such duplication of proof. The opinion of this Court, however, could well be construed as raising such a rule.

4. If in this case the Government had been relying primarily upon appellant's signed admission (R. 107-110), instead of net worth proof, it is submitted that establishment of the net worth increases without taking into account cash on hand would supply the necessary corroboration for the confession. In short, visible increases in a man's wealth beyond his reported income clearly have probative force even though the Government presents no evidence to preclude the existence of an accumulation of cash at the starting point. This is ably argued in the dissenting opinion in *Bryan* v. *United States,* 175 F. 2d 223, 227-229 (C.A. 5th), cited with apparent approval in *Gariepy* v. *United States,* 189 F. 2d 459, 462 (C.A. 8th), and by this Court in *Remmer* v. *United States,* 205 F. 2d 277, 287 (C.A. 9th). And compare *Bell* v. *United States, supra.*

Assuming (but vigorously denying) that the Government's net worth proof in this case like that in the *Bryan* case does not by itself meet thte strict standard for sustaining a conviction, it most certainly does constitute sufficient corroboration of the defendant's confession under the above-cited rule of this Court that corroborating proof need not independently prove the commission of the crime charged, neither beyond a reasonable doubt nor by a preponderance of proof. *Davena* v. *United States, supra.*

CONCLUSION

It is respectfully submitted that the opinion of this Court is contrary to law and is inconsistent with the established facts.

WHEREFORE, it is requested that this petition for rehearing be granted and that the opinion of October 1, 1953, be withdrawn and the decision below affirmed.

Respectfully submitted,

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November, 1953.